STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID BARKER,

Defendant-Appellant.

UNPUBLISHED
March 10, 2005

No. 253403
Saginaw Circuit Court
LC No. 02-021182-FC

Before: Hoekstra, P.J., and Neff and Schuette, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of conspiracy to commit armed robbery, MCL 750.157a and MCL 750.529, first-degree home invasion, MCL 750.110a(2), assault with intent to rob while armed, MCL 750.89, carrying a dangerous weapon with unlawful intent, MCL 750.226, possession of a firearm during the commission of a felony, MCL 750.227b, and possession of a firearm by a felon, MCL 750.224f. Defendant was subsequently sentenced as a second habitual offender, MCL 769.10, to concurrent prison terms of 10 to 40 years for his conspiracy to commit armed robbery conviction, 10 to 30 years for his conviction of first-degree home invasion, 18 to 40 years for his conviction of assault with intent to rob while armed, 5 to 7½ years for his conviction of carrying a dangerous weapon with unlawful intent, and 5 to 7½ years for his conviction of possessing a firearm as a felon. Defendant was also sentenced to consecutively serve a two-year term for his felony-firearm conviction. Defendant appeals as of right. We affirm defendant's convictions, but remand for resentencing or articulation of substantial and compelling reasons to support a departure from the appropriate sentencing guidelines' range.

Defendant first argues that the trial court erred in denying his *Batson*[1] motion. This Court reviews a trial court's ruling regarding alleged discriminatory use of peremptory challenges for an abuse of discretion. *People v Eccles*, 260 Mich App 379, 387; 677 NW2d 76 (2004). In *Batson v Kentucky*, 476 US 79, 89; 106 S Ct 1712; 90 L Ed 2d 69 (1986), the United States Supreme Court held that a prosecutor's use of a peremptory challenge to strike a juror solely because of race violates the Equal Protection Clause of the Fourteenth Amendment. To present a

[1] *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986).

challenge based on *Batson*, a defendant must show "that members of a cognizable racial group are being peremptorily removed from the jury pool and . . . articulate facts to establish an inference that the right to remove jurors peremptorily is being used to exclude one or more potential jurors from the jury on the basis of race." *People v Bell* (*On Reconsideration*), 259 Mich App 583, 590-591; 675 NW2d 894 (2003), lv gtd 470 Mich 870 (2004). Once a defendant establishes this prima facie case of discrimination, the burden shifts to the prosecutor to present a race neutral explanation for the challenges. *Batson*, *supra* at 97. However, the prosecution's explanation does not have to be particularly persuasive or plausible, only race neutral. *Purkett v Elem*, 514 US 765, 767-768; 115 S Ct 1769; 131 L Ed 2d 834 (1995). The trial court must thereafter decide whether the defendant has shown purposeful discrimination. *Batson*, *supra* at 98.

In this case, the prosecutor removed three jurors from the panel who were African-American. In response to an objection by defense counsel following removal of the third juror, the trial court noted that two of the challenges were exercised for obvious reasons, i.e., because the potential juror or someone they knew had been charged with or convicted of a crime. The trial court did not, however, request that the prosecutor provide an explanation for his peremptory challenge of these two jurors. Defendant argues on appeal that the trial court erred in failing to require the prosecutor to provide such an explanation. We disagree. No race neutral explanation was necessary because defendant failed to articulate facts establishing an inference of discrimination. *Bell*, *supra*. Indeed, the mere fact that these jurors were African-American is itself insufficient to establish a prima facie case of discrimination. See *People v Williams*, 174 Mich App 132, 137; 435 NW2d 469 (1989). Nonetheless, even had defendant established a prima facie case, the existence of a criminal conviction for one of the jurors and criminal charges pending against the son of the other, provide a sufficiently race neutral explanation for the exclusion of these two jurors. *Purkett*, *supra*; see also *Bell*, *supra*. Consequently, defendant is entitled to no relief on this claimed error.[2]

Defendant next argues that the evidence at trial was insufficient to support his conviction of conspiracy to commit armed robbery. Again, we disagree. To resolve a sufficiency of the evidence claim, this Court must determine "whether the evidence, viewed in a light most favorable to the people, would warrant a reasonable juror in finding guilt beyond a reasonable doubt." *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). Because this standard of review is deferential, we must draw inferences and make credibility determinations in favor of the jury verdict. *Id*. at 400.

A criminal conspiracy is an agreement, express or implied, between two or more people to accomplish an unlawful or criminal activity. *People v Bettistea*, 173 Mich App 106, 117; 434 NW2d 138 (1988). "The elements of a conspiracy are satisfied immediately upon entry by the

[2] Although defendant does not allege any error with respect to the prosecutor's challenge of the third juror, we note that the trial court did request an explanation for the challenge of this juror. In response, the prosecutor noted that the juror had not been forthcoming when asked if any friends or relatives of the juror had ever been accused or convicted of a crime. We see no error in the trial court's subsequent acceptance of this race neutral basis for exclusion.

parties into a mutual agreement; no overt acts need be established." *Id*. It is not necessary for each of the conspirators to have full knowledge of the extent of the conspiracy. *People v Hunter*, 466 Mich 1, 7; 643 NW2d 218 (2002). Additionally, although no overt acts are needed to prove a conspiracy charge, "[w]hat the conspirators actually did in furtherance of the conspiracy is evidence of what they had agreed to do." *Id*. at 9.

In order to prove the conspiracy to commit armed robbery charged in this case, the prosecutor was required to show that defendant knowingly entered into an agreement with at least one other person to commit armed robbery. When viewed in a light most favorable to the prosecution, the evidence at trial showed that defendant, along with two other men, entered into the victims' home armed with guns, and asked the victims for money and drugs. Two of the men then searched the home, pulling out drawers and knocking things over, while defendant held the victims at gunpoint. This evidence was sufficient evidence to support defendant's conspiracy conviction. *Id*. The fact that the men ultimately did not take any items or money from the home does not negate the crime of conspiracy. As previously noted, the crime of conspiracy is committed at the time the agreement to commit the unlawful act is made, *People v Justice* (*After Remand*), 454 Mich 334, 345-346; 562 NW2d 652 (1997), and therefore, evidence that the agreed upon unlawful act was actually completed was not necessary.

Defendant also argues that the trial court erred when it failed to instruct the jury regarding felonious assault as a necessarily included lesser offense of assault with intent to rob while armed.[3] Although we believe that the trial court erred in refusing to give this instruction, see *People v Stubbs*, 110 Mich App 287, 291; 312 NW2d 232 (1981), we conclude that the error was harmless. *People v Cornell*, 466 Mich 335, 361; 646 NW2d 127 (2002).

Preserved instructional error will not result in reversal on appeal '"unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative.'" *Id*. at 363-364, quoting *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). The error must have, in other words, undermined the reliability of the verdict. *Cornell*, *supra* at 364. Although one theory of defense advanced by defendant at trial was that he broke into the victim's home without an intent to rob or steal, his primary defense was that he was not one of the men who broke into the house. Cf. *People v Silver*, 466 Mich 386, 392-393; 646 NW2d 150 (2002) (concluding that the failure to instruct on a necessarily included lesser offense was not harmless when the defendant's only theory throughout the entire trial was the lack of proof of an intent to steal). Additionally, there was evidence that the men who broke into the home did intend to rob or steal. The victims testified

[3] Defendant also appears to argue that instruction on this offense was similarly appropriate with respect to the charge of conspiracy to commit armed robbery. However, our Supreme Court has held that instruction on an inferior offense is required only where "'it would be impossible to commit the greater offense without first having committed the lesser.'" *People v Bearss*, 463 Mich 623, 627; 625 NW2d 10 (2001), quoting *People v Jones*, 395 Mich 379, 387; 236 NW2d 461 (1975). Because one need not commit the offense of felonious assault in order to commit the greater offense of conspiracy to commit armed robbery, instruction on this offense was neither required nor permitted. See *People v Cornell*, 466 Mich 335, 359; 646 NW2d 127 (2002).

that the men asked them for money and that they searched the home looking for something. Although a rational view of the evidence would support giving the jury an instruction on felonious assault, see *People v Nickens*, 470 Mich 622, 626; 685 NW2d 657 (2004), we cannot say that it was more probable than not that the trial court's error in failing to so instruct the jury was outcome determinative. *Cornell, supra*. Accordingly, defendant is entitled to no relief on this claimed error.

Next, we sua sponte note that the trial court erred in ordering that the two-year mandatory sentence for defendant's conviction of felony-firearm be served consecutively to each of the other sentences imposed by the court. In *People v Clark*, 463 Mich 459, 463-464; 619 NW2d 538 (2000), our Supreme Court held that a felony-firearm sentence is to run consecutively only to the sentence for the underlying or predicate offense, not to all other felonies of which a defendant is convicted. In this case, defendant's conviction of first-degree home invasion constitutes the predicate felony for the sole count of felony-firearm of which defendant was convicted. Consequently, defendant's sentence for the felony-firearm conviction should run consecutively only to his conviction of first-degree home invasion. *Id*.

Additionally, we note that the trial court erred in scoring twenty-five points for offense variable (OV) 13 of the sentencing guidelines. MCL 777.43 instructs a court to score twenty-five points under OV 13 if "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(b). Citing defendant's instant convictions of conspiracy to commit armed robbery, first-degree home invasion, assault with intent to rob while armed, and carrying a dangerous weapon with unlawful intent, the prosecutor argued at sentencing that OV 13 was properly scored at twenty-five points because each of the cited offenses constitute a crime against either the person or property for purposes of MCL 777.43(1)(b). The trial court agreed and, over objection by defense counsel, scored OV 13 at twenty-five points. We note, however, that although the offenses of first-degree home invasion and assault with intent to rob while armed constitute crimes against a person for purposes of the sentencing guidelines, see MCL 777.16d and MCL 777.16f, the offenses of conspiracy and carrying a dangerous weapons with unlawful intent are classified as crimes against public safety, see MCL 777.18 and MCL 777.16m. Consequently, we conclude that the trial court improperly scored OV 13 at twenty-five points; rather, no points should have been scored. See MCL 777.43(1)(g). Moreover, because the reduction in score for OV 13 places defendant's sentence for his conviction of assault with intent to rob while armed above the appropriate sentencing guidelines,[4] we must remand this case for resentencing or articulation of a substantial and compelling reason for a departure from that range. See MCL 769.34; see also MCR 7.216(A)(7).

[4] The trial court's scoring of the guidelines for defendant's assault with intent to rob while armed conviction placed defendant in prior record level D and offense variable level III for class A offenses against the person, resulting in a minimum sentence range of 108 to 225 months imprisonment, as second habitual offender. Reduction of OV 13 to a score of zero places defendant in offense variable level II, and results in a new sentencing guidelines' range of 81 to 168 months' imprisonment. Thus, defendant's minimum sentence of eighteen years', i.e., 216 months', imprisonment for his conviction of assault with intent to rob while armed exceeds the applicable guidelines' range.

We affirm defendant's convictions, but remand this matter to the trial court for resentencing or articulation of substantial and compelling reasons to support a departure from the sentencing guidelines range. Regardless of which procedure is employed by the trial court, a judgment of sentence appropriately reflecting the consecutive nature of defendant's felony-firearm conviction must be entered by the trial court on remand. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Janet T. Neff
/s/ Bill Schuette